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**AMERICAN CIVIL LIBERTIES  
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**OFFICERS AND DIRECTORS**

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**Re: Request Under Freedom of Information Act  
(Expedited Processing & Fee Waiver/Limitation Requested)**

To Whom It May Concern:

The American Civil Liberties Union and the American Civil Liberties Union Foundation (together, the “ACLU”)<sup>1</sup> submit this Freedom of Information Act request (the “Request”) for records concerning the federal government’s record retention policies, the use of private messaging applications by federal employees, and the free speech rights of federal employees.

**I. Background**

Record retention laws like the Freedom of Information Act, 5 U.S.C. § 552, the Presidential Records Act, 44 U.S.C. §2201, and the Federal Records Act, 44 U.S.C. § 3101, are important. They require the government to document its performance of official duties, and so make it possible for the public to hold the government to account. *See, e.g., Nat’l Archives & Records Admin. v. Favish*, 541 U.S. 157, 171–72 (2004) (the citizens’ ability “to know ‘what their Government is up to’ . . . should not be dismissed as a convenient formalism. It defines a structural necessity in a real democracy. . . The information belongs to citizens”); *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978) (Congress enacted FOIA to “ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed.”).

History has shown that government officials on both sides of the aisle often fail to take this obligation seriously, particularly when it comes to records created with newer technology. Former White House Deputy Chief of Staff Karl Rove (along with approximately 50 other Bush administration staffers) used a non-government email account for official communications, and roughly 22 million e-mails from such accounts were deleted during the Bush administration instead of being archived in accordance with the law.<sup>2</sup> While serving as

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<sup>1</sup> The American Civil Liberties Union Foundation is a 501(c)(3) organization that provides legal representation free of charge to individuals and organizations in civil rights and civil liberties cases, educates the public about the civil rights and civil liberties implications of pending and proposed state and federal legislation, provides analyses of pending and proposed legislation, directly lobbies legislators, and mobilizes its members to lobby their legislators. The American Civil Liberties Union is a separate non-profit, 501(c)(4) membership organization that educates the public about the civil liberties implications of pending and proposed state and federal legislation, provides analysis of pending and proposed legislation, directly lobbies legislators, and mobilizes its members to lobby their legislators.

<sup>2</sup> *See* Massimo Calabresi, *Inside the Bush E-Mail Scandal*, Time, Apr. 13, 2007, <http://content.time.com/time/nation/article/0,8599,1610414,00.html>; John Bresnahan, *White House E-mails from 2001-03 Deleted, but Rove Messages Kept from '05 On*, Politico, Apr. 12, 2007, <http://www.politico.com/blogs/politico-now/2007/04/white-house-e-mails-from-2001-03-deleted-but-rove-messages-kept-from-05-on-001007>; Dan Froomkin, *The Rovian Theory*, Wash.

Secretary of State, Hillary Clinton used a private email server for her emails, and deleted thousands of those emails because they were “private.”<sup>3</sup> Most recently, Vice President Mike Pence relied on a private email account for his work as governor of Indiana, and it was hacked.<sup>4</sup>

Each of these examples represents a failure to live up not only to legal obligations, but also to foundational principles of accountability and transparency. But attempts to crack down on public employee speech can also go too far: not every document created by a federal employee falls within the purview of the record retention laws. Individuals who take a job with the government do not thereby lose their First Amendment right to speak, on their own time, about matters that concern the public—or to do so using private email accounts and communication platforms.<sup>5</sup>

This means that government policy around record retention of employee communications must walk a fine line. Attempts to crack down on employee speech rights and legitimate whistleblowing cannot be dressed up as concerns about record retention.

Recently, the House Science Committee demanded an inquiry into the use of encryption by EPA employees,<sup>6</sup> and White House Press Secretary Sean Spicer reportedly conducted at least one random check of White House employees’ cellphones.<sup>7</sup>

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Post, March 23, 2007,  
[http://www.washingtonpost.com/wpdyn/content/blog/2007/03/23/BL2007032301067\\_pf.html](http://www.washingtonpost.com/wpdyn/content/blog/2007/03/23/BL2007032301067_pf.html).

<sup>3</sup> Chris Cillizza, *12 things I learned from the FBI report on Hillary Clinton’s private email server*, Wash. Post, Sept. 2, 2016, [https://www.washingtonpost.com/news/the-fix/wp/2016/09/02/12-things-i-learned-from-the-fbi-report-on-hillary-clintons-private-email-server/?utm\\_term=.a9442a581d2d](https://www.washingtonpost.com/news/the-fix/wp/2016/09/02/12-things-i-learned-from-the-fbi-report-on-hillary-clintons-private-email-server/?utm_term=.a9442a581d2d); Paul Roderick Gregory, *Hillary Clinton’s Emails: The Missing Point*, Forbes, July 9, 2016, <https://www.forbes.com/sites/paulroderickgregory/2016/07/09/its-the-30000-wiped-clean-clinton-e-mails/#1cf3b47c9a67>.

<sup>4</sup> Tony Cook, *Pence used personal email for state business—and was hacked*, Indy Star, Mar. 2, 2017, <http://www.indystar.com/story/news/politics/2017/03/02/pence-used-personal-email-state-business---and-hacked/98604904/>.

<sup>5</sup> See Esha Bhandari, *Government Employees Get to Have Opinions, Too*, ACLU, Jan. 25, 2017, <https://www.aclu.org/blog/speak-freely/government-employees-get-have-opinions-too>.

<sup>6</sup> Andrew Restuccia and Nancy Cook, *Trump Inspires Encryption Boom in Leaky D.C.*, POLITICO, Feb. 27, 2017, <http://politi.co/2mBfQoA>; Andrew Restuccia, *Conservatives demanding details on federal workers’ encryption use*, POLITICO, Feb. 14, 2017, <http://politi.co/2mBgMsV>.

<sup>7</sup> Annie Karni and Alex Isenstadt, *Sean Spicer targets own staff in leak crackdown*, POLITICO, Feb. 26, 2017, <http://politi.co/2mBrwYD>.

As an initial matter, the focus on encrypted communications is misplaced. While ephemeral messaging applications may pose problems for record retention, the use of encrypted communications in transit is a practice to be encouraged, both inside and outside of the government.<sup>8</sup> It should not prevent the retention of records once they reach their destination, and instead makes the transmission of records more secure.

In contrast, the concerns raised by the recent surge in the use of ephemeral messaging applications by federal employees—including in the White House itself<sup>9</sup>—are legitimate, but official inquiries may cross the line into unacceptable clampdowns on speech. Many federal employees claim that they are using private messaging for personal communications only—for example, to arrange meetings outside of work time in private spaces—or to understand their rights as whistleblowers.<sup>10</sup>

Given the weight of the principles at stake and the confusion that abounds regarding how record retention policies apply to new technologies and personal communications,<sup>11</sup> the ACLU seeks to supplement the public record with official guidance regarding record retention. Through this request, the ACLU aims to facilitate the public's indispensable role in checking the power of our public officials and ensuring that federal agencies remain accountable to the public, while also protecting the free speech rights of federal employees.

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<sup>8</sup> Ed Felten, *On Encryption Apps in the White House*, FREEDOM TO TINKER, Feb. 27, 2017, <https://freedom-to-tinker.com/2017/02/27/on-encryption-apps-in-the-white-house/>.

<sup>9</sup> Individuals within the Environmental Protection Agency (“EPA”), the State Department, the Department of Homeland Security, and the Department of Transportation, as well as White House Press Secretary Sean Spicer and White House aide Hope Hicks have been identified as current or former users of confidential messaging applications. See, e.g., Ashley Parker and Philip Rucker, *Upheaval is Now Standard Operating Procedure Inside the White House*, WASH. POST, Feb. 13, 2017, <http://wapo.st/2mBcxh6>; Jonathan Swan and David McCabe, *Confide: The App for Paranoid Republicans*, AXIOS, Feb. 8, 2017, <https://www.axios.com/confide-the-new-app-for-paranoid-republicans-2246297664.html>; Andrew Restuccia et al., *Federal Workers Turn to Encryption to Thwart Trump*, POLITICO, Feb. 2, 2017, <http://politi.co/2mBa7z0>.

<sup>10</sup> See, e.g., Restuccia and Cook, *supra* note 6; Lily Hay Newman, *Encryption Apps Help White House Staffers Leak—And Maybe Break the Law*, WIRED, Feb. 15, 2017, <https://www.wired.com/2017/02/white-house-encryption-confide-app>; Andrew Restuccia et al., *supra* note 9.

<sup>11</sup> Brody Levesque, *Trump White House Staff Use of ‘Disappearing’ Messaging App Violates Presidential Records Act*, New Civil Rights Movement, Feb. 14, 2017, [http://www.thenewcivilrightsmovement.com/trump\\_staff\\_using\\_disappearing\\_messaging\\_app\\_which\\_violates\\_presidential\\_records\\_act](http://www.thenewcivilrightsmovement.com/trump_staff_using_disappearing_messaging_app_which_violates_presidential_records_act) (describing ignorance “run[ning] rampant” in the White House about what is permissible for staff communications).

## **II. Requested Records**

The ACLU seeks release of Records<sup>12</sup> created, enacted, or recirculated on or after November 9, 2016 concerning:

1. Interpretations of definitions and obligations related to record retention under the Presidential Records Act, 44 U.S.C. § 2201 *et seq.*, including but not limited to what constitutes a “presidential record” under the terms of the PRA;
2. Interpretations of definitions and obligations related to record retention under the Federal Records Act, 44 U.S.C. § 3101 *et seq.*;
3. Interpretations of definitions and obligations related to record retention under the Freedom of Information Act, 5 U.S.C. § 552;
4. Communications between the National Archivist, the President, members of Congress and/or agency heads concerning deleted records;
5. Guidance or guidelines issued to federal employees regarding:
  - a. Distinctions between official and personal communications, including but not limited to when a communication is considered subject to record retention rules;
  - b. The use of encryption for communication;
  - c. The use of messaging applications that default to deleting read messages or otherwise have the potential to obstruct official data retention; and
  - d. Any protections for communications used for whistleblowing.
6. Enforcement of any record-retention obligations under the PRA, FRA, FOIA, or other policies, including but not limited to records concerning disciplinary proceedings, internal audits and reviews, and compliance notices; and

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<sup>12</sup> For the purposes of this Request, “Records” are collectively defined to include, but are not limited to: e-mails; social-media posts; instructions; directives; guidance documents; formal and informal presentations; training documents; bulletins; alerts; updates; advisories; reports; legal and policy memoranda; contracts or agreements; minutes or notes of meetings and phone calls; memoranda; legal opinions; evaluations; memorializations; and guidelines.

7. Mr. Spicer's warning to White House employees that any use of encrypted messaging applications violates federal record retention obligations, including but not limited to any legal analysis conducted to support the warning.<sup>13</sup>

With respect to the form of production, *see* 5 U.S.C. § 552(a)(3)(B), the ACLU requests that responsive electronic records be provided electronically in their native file format, if possible. Alternatively, the ACLU requests that the records be provided electronically in a text-searchable, static-image format (PDF), in the best image quality in the agency's possession, and that the records be provided in separate, Bates-stamped files.

### **III. Application for Expedited Processing**

The ACLU requests expedited processing pursuant to 5 U.S.C. § 552(a)(6)(E).<sup>14</sup> There is a "compelling need" for these records, as defined in the statute, because the information requested is "urgen[tly]" needed by an organization primarily engaged in disseminating information "to inform the public concerning actual or alleged Federal Government activity." 5 U.S.C. § 552(a)(6)(E)(v)(II).

A. *The ACLU is an organization primarily engaged in disseminating information in order to inform the public about actual or alleged government activity.*

The ACLU is "primarily engaged in disseminating information" within the meaning of the statute. 5 U.S.C. § 552(a)(6)(E)(v)(II).<sup>15</sup> Obtaining information about government activity, analyzing that information, and widely publishing and disseminating that information to the press and public are critical and substantial components of the ACLU's work and are among its primary activities. *See ACLU v. DOJ*, 321 F. Supp. 2d 24, 29 n.5 (D.D.C. 2004) (finding non-profit public interest group that "gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw material into a distinct work, and distributes that work to an audience" to be "primarily engaged in disseminating information").<sup>16</sup>

The ACLU regularly publishes *STAND*, a print magazine that reports on

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<sup>13</sup> *See Restuccia and Cook*, *supra* note 6.

<sup>14</sup> *See also* 28 C.F.R. § 16.5(e).

<sup>15</sup> *See also* 28 C.F.R. § 16.5(e)(1)(ii).

<sup>16</sup> Courts have found that the ACLU as well as other organizations with similar missions that engage in information-dissemination activities similar to the ACLU are "primarily engaged in disseminating information." *See, e.g., Leadership Conference on Civil Rights v. Gonzales*, 404 F. Supp. 2d 246, 260 (D.D.C. 2005); *ACLU*, 321 F. Supp. 2d at 29 n.5; *Elec. Privacy Info. Ctr. v. DOD*, 241 F. Supp. 2d 5, 11 (D.D.C. 2003).

and analyzes civil liberties-related current events. The magazine is disseminated to over 620,000 people. The ACLU also publishes regular updates and alerts via email to approximately 2.15 million subscribers (both ACLU members and non-members). These updates are additionally broadcast to 1.5 million social media followers (members and non-members). The magazine as well as the email and social-media alerts often include descriptions and analysis of information obtained through FOIA requests.

The ACLU also regularly issues press releases to call attention to documents obtained through FOIA requests, as well as other breaking news,<sup>17</sup> and ACLU attorneys are interviewed frequently for news stories about documents released through ACLU FOIA requests.<sup>18</sup>

Similarly, the ACLU publishes reports about government conduct and civil liberties issues based on its analysis of information derived from various sources, including information obtained from the government through FOIA requests. This material is broadly circulated to the public and widely available to everyone for no cost or, sometimes, for a small fee. ACLU national projects regularly publish and disseminate reports that include a description and analysis of government documents obtained through FOIA requests.<sup>19</sup> The ACLU also

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<sup>17</sup> See, e.g., Press Release, American Civil Liberties Union, U.S. Releases Drone Strike ‘Playbook’ in Response to ACLU Lawsuit (Aug. 6, 2016), <https://www.aclu.org/news/us-releases-drone-strike-playbook-response-aclu-lawsuit>; Press Release, American Civil Liberties Union, Secret Documents Describe Graphic Abuse and Admit Mistakes (June 14, 2016), <https://www.aclu.org/news/cia-releases-dozens-torture-documents-response-aclu-lawsuit>; Press Release, American Civil Liberties Union, U.S. Releases Targeted Killing Memo in Response to Long-Running ACLU Lawsuit (June 23, 2014), <https://www.aclu.org/national-security/us-releases-targeted-killing-memo-response-long-running-aclu-lawsuit>; Press Release, American Civil Liberties Union, Justice Department White Paper Details Rationale for Targeted Killing of Americans (Feb. 4, 2013), <https://www.aclu.org/national-security/justice-department-white-paper-details-rationale-targeted-killing-americans>; Press Release, American Civil Liberties Union, Documents Show FBI Monitored Bay Area Occupy Movement (Sept. 14, 2012), <https://www.aclu.org/news/documents-show-fbi-monitored-bay-area-occupy-movement-insidebayareacom>.

<sup>18</sup> See, e.g., Karen DeYoung, *Newly Declassified Document Sheds Light on How President Approves Drone Strikes*, Wash. Post, Aug. 6, 2016, <http://wapo.st/2jy62cW> (quoting former ACLU deputy legal director Jameel Jaffer); Catherine Thorbecke, *What Newly Released CIA Documents Reveal About ‘Torture’ in Its Former Detention Program*, ABC, June 15, 2016, <http://abcn.ws/2jy40d3> (quoting ACLU staff attorney Dror Ladin); Nicky Woolf, *US Marshals Spent \$10M on Equipment for Warrantless Stingray Device*, Guardian, Mar. 17, 2016, <https://www.theguardian.com/world/2016/mar/17/us-marshals-stingray-surveillance-airborne> (quoting ACLU attorney Nate Wessler); David Welna, *Government Suspected of Wanting CIA Torture Report to Remain Secret*, NPR, Dec. 9, 2015, <http://n.pr/2jy2p71> (quoting ACLU project director Hina Shamsi).

<sup>19</sup> See, e.g., ACLU, *ACLU-Obtained Emails Prove that the Federal Bureau of Prisons Covered Up Its Visit to the CIA’s Torture Site* (Nov. 22, 2016, 3:15 PM), <https://www.aclu.org/blog/speak-freely/aclu-obtained-emails-prove-federal-bureau-prisons-covered-its-visit-cias-torture>; ACLU, *Details Abound in Drone ‘Playbook’ – Except for the Ones That Really Matter Most* (Aug. 8, 2016, 5:30 PM), <https://www.aclu.org/blog/speak-freely/details-abound-drone-playbook-except-ones-really-matter-most>; ACLU, *ACLU-*

regularly publishes books, “know your rights” materials, fact sheets, and educational brochures and pamphlets designed to educate the public about civil liberties issues and government policies that implicate civil rights and liberties.

The ACLU publishes a widely read blog where original editorial content reporting on and analyzing civil rights and civil liberties news is posted daily. *See* <https://www.aclu.org/blog>. The ACLU creates and disseminates original editorial and educational content on civil rights and civil liberties news through multi-media projects, including videos, podcasts, and interactive features. *See* <https://www.aclu.org/multimedia>. The ACLU also publishes, analyzes, and disseminates information through its heavily visited website, [www.aclu.org](http://www.aclu.org). The website addresses civil rights and civil liberties issues in depth, provides features on civil rights and civil liberties issues in the news, and contains many thousands of documents relating to the issues on which the ACLU is focused. The ACLU’s website also serves as a clearinghouse for news about ACLU cases, as well as analysis about case developments, and an archive of case-related documents. Through these pages, and with respect to each specific civil liberties issue, the ACLU provides the public with educational material, recent news, analyses of relevant Congressional or executive branch action, government documents obtained through FOIA requests, and further in-depth analytic and educational multi-media features.

The ACLU website includes many features on information obtained through the FOIA.<sup>20</sup> For example, the ACLU’s “Predator Drones FOIA” webpage, <https://www.aclu.org/national-security/predator-drones-foia>, contains commentary about the ACLU’s FOIA request, press releases, analysis of the FOIA documents, numerous blog posts on the issue, documents related to litigation over the FOIA request, frequently asked questions about targeted killing, and links to the documents themselves. Similarly, the ACLU maintains an online “Torture Database,” a compilation of over 100,000 pages of FOIA documents that allows researchers and the public to conduct sophisticated

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Obtained Documents Reveal Breadth of Secretive Stingray Use in Florida (Feb. 22, 2015, 5:30 PM), <https://www.aclu.org/blog/free-future/aclu-obtained-documents-reveal-breadth-secretive-stingray-use-florida>; ACLU, New NSA Documents Shine More Light into Black Box of Executive Order 12333 (Oct. 30, 2014, 3:29 PM), <https://www.aclu.org/blog/new-nsa-documents-shine-more-light-black-box-executive-order-12333>; ACLU, ACLU Eye on the FBI: Documents Reveal Lack of Privacy Safeguards and Guidance in Government’s “Suspicious Activity Report” Systems (Oct. 29, 2013), [https://www.aclu.org/sites/default/files/assets/eye\\_on\\_fbi\\_-\\_sars.pdf](https://www.aclu.org/sites/default/files/assets/eye_on_fbi_-_sars.pdf).

<sup>20</sup> *See, e.g.*, <https://www.aclu.org/blog/free-future/fbi-releases-details-zero-day-exploit-decisionmaking-process>; <https://www.aclu.org/blog/free-future/fbi-documents-reveal-new-information-baltimore-surveillance-flights>; <https://www.aclu.org/national-security/anwar-al-awlaki-foia-request>; <https://www.aclu.org/cases/aclu-v-department-defense>; <https://www.aclu.org/mappingthefbi>; <https://www.aclu.org/cases/bagram-foia>; <https://www.aclu.org/national-security/csrt-foia>; <http://www.aclu.org/safefree/nsaspying/30022res20060207.html>; <https://www.aclu.org/patriot-foia>; <https://www.aclu.org/nsi-documents-released-dod?redirect=cpreirect/32088>.



searches of FOIA documents relating to government policies on rendition, detention, and interrogation.<sup>21</sup>

The ACLU has also published a number of charts and explanatory materials that collect, summarize, and analyze information it has obtained through the FOIA. For example, through compilation and analysis of information gathered from various sources—including information obtained from the government through FOIA requests—the ACLU created an original chart that provides the public and news media with a comprehensive summary index of Bush-era Office of Legal Counsel memos relating to interrogation, detention, rendition, and surveillance.<sup>22</sup> Similarly, the ACLU produced a summary of documents released in response to a FOIA request related to the FISA Amendments Act<sup>23</sup>; a chart of original statistics about the Defense Department's use of National Security Letters based on its own analysis of records obtained through FOIA requests<sup>24</sup>; and an analysis of documents obtained through FOIA requests about FBI surveillance flights over Baltimore.<sup>25</sup>

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The ACLU plans to analyze, publish, and disseminate to the public the information gathered through this Request. The records requested are not sought for commercial use and the requesters plan to disseminate the information disclosed as a result of this Request to the public at no cost.

*B. The records sought are urgently needed to inform the public about actual or alleged government activity.*

These records are urgently needed to inform the public about actual or alleged government activity. *See* 5 U.S.C. § 552(a)(6)(E)(v)(II).<sup>26</sup> Specifically, as discussed in Part I, *supra*, release of the requested records would inform the public about the federal government's efforts to abide by its record retention obligations while also respecting the First Amendment rights of employees.

Given the foregoing, the ACLU has satisfied the requirements for expedited processing of this Request.

#### **IV. Application for Waiver or Limitation of Fees**

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<sup>21</sup> <https://www.thetorturedatabase.org>. *See also* <https://www.aclu.org/foia-collection/targeted-killing-foia-database>.

<sup>22</sup> [https://www.aclu.org/sites/default/files/pdfs/safefree/olcmemos\\_2009\\_0305.pdf](https://www.aclu.org/sites/default/files/pdfs/safefree/olcmemos_2009_0305.pdf).

<sup>23</sup> <https://www.aclu.org/files/pdfs/natsec/faafoia20101129/20101129Summary.pdf>.

<sup>24</sup> [https://www.aclu.org/sites/default/files/field\\_document/nsl\\_stats.pdf](https://www.aclu.org/sites/default/files/field_document/nsl_stats.pdf).

<sup>25</sup> <https://www.aclu.org/blog/free-future/fbi-documents-reveal-new-information-baltimore-surveillance-flights>.

<sup>26</sup> *See also* 28 C.F.R. § 16.5(e)(1)(ii).

The ACLU requests a waiver of document search, review, and duplication fees on the grounds that disclosure of the requested records is in the public interest and because disclosure is “likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” 5 U.S.C. § 552(a)(4)(A)(iii).<sup>27</sup> The ACLU also requests a waiver of search fees on the grounds that the ACLU qualifies as a “representative of the news media” and the records are not sought for commercial use. 5 U.S.C. § 552(a)(4)(A)(ii)(II).

*A. The Request is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the ACLU.*

As discussed above, news accounts underscore the substantial public interest in the records sought through this Request. Given the ongoing and widespread media attention to this issue, the records sought will significantly contribute to public understanding of an issue of profound public importance. Especially because public officials appear to disagree on the legal reach of record retention obligations, the records sought are certain to contribute significantly to the public’s understanding of these issues.

The ACLU is not filing this Request to further its commercial interest. As described above, any information disclosed by the ACLU as a result of this FOIA Request will be available to the public at no cost. Thus, a fee waiver would fulfill Congress’s legislative intent in amending the FOIA. *See Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003) (“Congress amended FOIA to ensure that it be liberally construed in favor of waivers for noncommercial requesters.” (quotation marks omitted)).

*B. The ACLU is a representative of the news media and the records are not sought for commercial use.*

The ACLU also requests a waiver of search fees on the grounds that the ACLU qualifies as a “representative of the news media” and the records are not sought for commercial use. 5 U.S.C. § 552(a)(4)(A)(ii)(II). The ACLU meets the statutory and regulatory definitions of a “representative of the news media” because it is an “entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience.” 5 U.S.C. § 552(a)(4)(A)(ii)(III)<sup>28</sup>; *see also Nat’l Sec. Archive v. DOD*, 880 F.2d 1381, 1387 (D.C. Cir. 1989) (finding that an organization that gathers information, exercises editorial discretion in selecting and organizing documents, “devises indices and finding

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<sup>27</sup> *See also* 28 C.F.R. § 16.10(k)(1).

<sup>28</sup> *See also* 28 C.F.R. § 16.10(b)(6).

aids,” and “distributes the resulting work to the public” is a “representative of the news media” for purposes of the FOIA); *Serv. Women’s Action Network v. DOD*, 888 F. Supp. 2d 282 (D. Conn. 2012) (requesters, including ACLU, were representatives of the news media and thus qualified for fee waivers for FOIA requests to the Department of Defense and Department of Veterans Affairs); *ACLU of Wash. v. DOJ*, No. C09–0642RSL, 2011 WL 887731, at \*10 (W.D. Wash. Mar. 10, 2011) (finding that the ACLU of Washington is an entity that “gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience”); *ACLU*, 321 F. Supp. 2d at 30 n.5 (finding non-profit public interest group to be “primarily engaged in disseminating information”). The ACLU is therefore a “representative of the news media” for the same reasons it is “primarily engaged in the dissemination of information.”

Furthermore, courts have found other organizations whose mission, function, publishing, and public education activities are similar in kind to the ACLU’s to be “representatives of the news media” as well. *See, e.g., Cause of Action v. IRS*, 125 F. Supp. 3d 145 (D.C. Cir. 2015); *Elec. Privacy Info. Ctr.*, 241 F. Supp. 2d at 10–15 (finding non-profit public interest group that disseminated an electronic newsletter and published books was a “representative of the news media” for purposes of the FOIA); *Nat’l Sec. Archive*, 880 F.2d at 1387; *Judicial Watch, Inc. v. DOJ*, 133 F. Supp. 2d 52, 53–54 (D.D.C. 2000) (finding Judicial Watch, self-described as a “public interest law firm,” a news media requester).<sup>29</sup>

On account of these factors, fees associated with responding to FOIA requests are regularly waived for the ACLU as a “representative of the news media.”<sup>30</sup> As was true in those instances, the ACLU meets the requirements for a fee waiver here.

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<sup>29</sup> Courts have found these organizations to be “representatives of the news media” even though they engage in litigation and lobbying activities beyond their dissemination of information / public education activities. *See, e.g., Elec. Privacy Info. Ctr.*, 241 F. Supp. 2d 5; *Nat’l Sec. Archive*, 880 F.2d at 1387; *see also Leadership Conference on Civil Rights*, 404 F. Supp. 2d at 260; *Judicial Watch, Inc.*, 133 F. Supp. 2d at 53–54.

<sup>30</sup> In May 2016, the FBI granted a fee-waiver request regarding a FOIA request submitted to the DOJ for documents related to Countering Violent Extremism Programs. In April 2013, the National Security Division of the DOJ granted a fee-waiver request with respect to a request for documents relating to the FISA Amendments Act. Also in April 2013, the DOJ granted a fee-waiver request regarding a FOIA request for documents related to “national security letters” issued under the Electronic Communications Privacy Act. In August 2013, the FBI granted the fee-waiver request related to the same FOIA request issued to the DOJ. In June 2011, the DOJ National Security Division granted a fee waiver to the ACLU with respect to a request for documents relating to the interpretation and implementation of a section of the PATRIOT Act. In March 2009, the State Department granted a fee waiver to the ACLU with regard to a FOIA request for documents relating to the detention, interrogation, treatment, or prosecution of suspected terrorists. Likewise, in December 2008, the DOJ granted the ACLU a fee waiver with respect to the same request. In November 2006, the Department of Health and Human Services granted a fee waiver to the ACLU with regard to a FOIA request. In May 2005, the U.S.

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Pursuant to applicable statutes and regulations, the ACLU expects a determination regarding expedited processing within 10 days. *See* 5 U.S.C. § 552(a)(6)(E)(ii); 28 C.F.R. § 16.5(e).

If the Request is denied in whole or in part, the ACLU asks that you justify all deletions by reference to specific exemptions to the FOIA. The ACLU expects the release of all segregable portions of otherwise exempt material. The ACLU reserves the right to appeal a decision to withhold any information or deny a waiver of fees.

Thank you for your prompt attention to this matter. Please furnish the applicable records to:

Vera Eidelman  
Brennan Legal Fellow  
American Civil Liberties Union  
125 Broad Street—18th Floor  
New York, New York 10004  
veidelman@aclu.org

I affirm that the information provided supporting the request for expedited processing is true and correct to the best of my knowledge and belief. *See* 5 U.S.C. § 552(a)(6)(E)(vi).

Respectfully,



Vera Eidelman  
Brennan Legal Fellow  
Speech, Privacy, and Technology Project

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Department of Commerce granted a fee waiver to the ACLU with respect to its request for information regarding the radio-frequency identification chips in United States passports. In March 2005, the Department of State granted a fee waiver to the ACLU on a request regarding the use of immigration laws to exclude prominent non-citizen scholars and intellectuals from the country because of their political views, statements, or associations. In addition, the Department of Defense did not charge the ACLU fees associated with FOIA requests submitted by the ACLU in April 2007, June 2006, February 2006, and October 2003. The DOJ did not charge the ACLU fees associated with FOIA requests submitted by the ACLU in November 2007, December 2005, and December 2004. Finally, three separate agencies—the Federal Bureau of Investigation, the Office of Intelligence Policy and Review, and the DOJ Office of Information and Privacy—did not charge the ACLU fees associated with a FOIA request submitted by the ACLU in August 2002.

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